CONTRIBUTION TO THE EUROPEAN COMMISSION'S CALL FOR EVIDENCE SEEKING FEEDBACK ON THE DRAFT GUIDELINES REGARDING THE IMPLEMENTATION OF THE FOREIGN SUBSIDIES REGULATION

Adina Claici (BRG), Bartosz Korchowiec (BRG)

BRG is a global economic consultancy that regularly advises clients on antitrust issues relating to European and national competition law. The opinions expressed herein are those of the individual authors and do not represent the opinions of BRG or its other employees and affiliates. The information provided is not intended to and does not render legal, accounting, tax or other professional advice or services, and no client relationship is established with BRG by making any information available in this publication. None of the information contained herein should be used as a substitute for consultation with competent advisors.

Contents

This document presents our contribution to the European Commission's (the "Commission" or "EC") consultation[1] on the draft guidelines to the regulation on foreign subsidies distorting the internal market (interchangeably the "FSR Guidelines" or "Guidelines").[2] The Guidelines are an important step towards clarifying both the objectives and practical implementation of the FSR Regulation ("FSR Regulation").[3]

Our contribution focuses on two key areas of the FSR Guidelines most relevant from an economic perspective. First, with regards to documenting the existence of a distortion, the FSR Guidelines identify several relevant theories of harm associated with potential distortive effects of foreign subsidies; however, the complex structure of the assessment and limited guidance of the construction of counterfactuals risk creating uncertainty for the investigated undertakings. Further clarity is needed in the Guidelines. Second, placing the burden of proof for demonstrating potential positive effects in the balancing test exclusively on the investigated undertakings, combined with an unclear definition of subsidy-specific aspects of these effects, may result again in a chilling effect for companies that intend to invest in Europe. Additionally, we suggest the Commission create a category of foreign subsidies which likely will bring positive effects to the internal market (as a mirror to the foreign subsidies that are likely to be distortive), such as subsidies for research and development. Finally, we recommend a broadening of the scope of these Guidelines to include clarifications on the notion of foreign subsidy, in the same spirit as the EC Notice for the notion of State aid.

The lack of clarity and pragmatism in the Guidelines would translate in the lack of predictability in the European Commission's enforcement of the FSR, which in turn could deter foreign companies from participating in acquisitions and public procurement processes. This possibly would lead to underinvestment and a loss for Europe in cases where such investments could bring positive effects and growth in the region.

I. The assessment of distortions could be further clarified

The assessment of distortions in the current Guidelines is done in two parts. First, the Guidelines provide five categories of foreign subsidies most likely to cause distortions to

---

1 EC, Call for Evidence seeking feedback on the draft guidelines to the regulation on foreign subsidies distorting the internal market. https://competition-policy.ec.europa.eu/public-consultations/guidelines-foreign-subsidies_en

2 EC, Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (July 2025, last accessed 19 August 2025). https://competition-policy.ec.europa.eu/document/download/a0b557e7-96f8-4231-9ed5-522f13de9065_en?filename=FSR_draft_guidelines_application_of_EU_Reg_2022-2560.pdf ("FSR Guidelines")

3 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (December 2022, last accessed 27 March 2025). https://eur-lex.europa.eu/eli/reg/2022/2560/oj ("FSR Regulation")

the internal market.[4] Subsidies that fall under these categories are presumed to be distortive, and the Commission does not need to provide a detailed assessment; however, stakeholders are allowed to rebut these presumptions and provide evidence showing that these subsidies are not distortive. Second, for all other categories of foreign subsidies, the Guidelines propose a two-leg test to determine the existence of a distortion. A foreign subsidy is considered distortive if it:

i. improves the competitive position of the beneficiary undertaking, and

ii. negatively affects competition in the internal market.

For the latter condition, we welcome the examples of categories of distortions provided by the Commission:

- Distortions in the acquisition process
- Distortions in the procurement process
- Distortions through operating decisions of the subsidised undertaking
- Distortions through change of investment decisions of the subsidised undertaking
- Distortions at other levels of the value chain, e.g. through technology transfers

The Commission plans to investigate these effects with a set of key indicators.[5]

A. Identification and measurement of distortions needs more clarity

The Guidelines aim to establish general principles for determining whether a foreign subsidy affects the internal market. However, the current draft falls short of providing a systematic, clear and simple structure for assessing potential negative effects.

First, while the examples of distortions (commonly referred to as "theories of harm") are illustrative, the overall structure of potential theories of harm remains unclear. In particular, it is unclear whether certain theories of harm apply to acquisitions, procurement procedures or both. Section 2.4 appears to present general principles,

---

4 These are: i) subsidies granted to undertakings that would go out of business in the absence of a subsidy, ii) unlimited guarantee for the debts and liabilities of the undertaking, iii) export financing measures that are outside of the Organisation for Economic Co-operation and Development supported export credits, iv) subsidy directly facilitating a concentration and v) subsidy enabling the undertaking to participate in a tender and submit an unduly advantageous offer. See FSR Guidelines, pp. 3–4.

5 These indicators include details of the foreign subsidy (scope, type, conditions, amount, etc.), size of the investigated undertaking, market characteristics (size, concentration, barriers to entry, etc.) and legal context.

except for 2.4.4.1 which is applicable only to acquisitions. However, section 2.5 focuses exclusively on procurement while still referencing elements from section 2.4.

Second, we understand that the Commission, in the public procurement part of FSR, is primarily concerned with distortions to the tendering process itself.[6] However, we believe this scope is too narrow. Depending on the scale of the economic activity carried out by the investigated undertaking within the European Union (EU), the procurement award may trigger subsequent operational or investment decisions that could distort (or potentially benefit) the internal market.[7] We strongly advocate for inclusion of a potential post-procurement assessment of market distortions. Otherwise, the existing anti-dumping instruments may prove more effective in the context of public procurement.[8]

The lack of a clear and systematic framework for identifying negative effects under the FSR risks deterring companies from participating in tenders, as evidenced by *all public procurement cases* where the Commission has launched and concluded an in-depth investigation.[9] This was evident in the Commission's first in-depth investigation in February 2024, where Chinese train manufacturer CRRC withdrew from a Bulgarian tender following scrutiny of its foreign subsidies. The opening decision lists all government grants received by CRRC that classify as financial contribution and concludes that these are likely to affect competition in the internal market.[10] The opening decision does not discuss their potential detrimental effect on the internal market.

CRRC's offer was reportedly half the price of the second bidder, i.e. approximately €300 million lower than the price offered by Spanish company Talgo.[11] This means that the

6 See FSR Guidelines, pp. 18–22.

7 For example, conditional on being awarded a tender, foreign subsidies may allow the undertaking to expand its market presence, reduce prices or deploy new technologies, actions that would not have materialised in the absence of the tender award.

8 If for public procurements the Commission plans to investigate only the distortions to the process that aim to establish whether the offer submitted by an investigated undertaking is unduly advantageous, anti-dumping investigation may be better suited than new FSR tools. Anti-dumping investigation is an effective tool that can assess whether an offer of undertaking was artificially low by comparing it against benchmark "fair price" or "normal value".

9 We are aware of three in-depth investigations under FSR related to public procurement that have been concluded as of 11 September 2025: Bulgarian train tender (investigation announced in February 2024) where the investigated company, CRRC, withdrew from the procurement; and Romanian tender for photovoltaic park (two investigations announced in April 2024) where two investigated consortia, led in partnerships with Chinese companies LONGi Green Energy Technology Co., Shanghai Electric UK Co. Ltd. and Shanghai Electric Hong Kong International Engineering Co. Ltd, withdrew from the procurement after the announcement of the investigation.

10 *"[...] there are sufficient indications that the foreign subsidies preliminarily identified [...] are liable to improve the competitive position of the Notifying Party in the internal market and, in doing so, actually or potentially negatively affect competition in the internal market within the meaning of Article 4 FSR".* Summary notice concerning the initiation of an in-depth investigation in case FSP.100147 pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560, European Commission (February 2024), p. 3.

11 "CRRC has withdrawn its bid from the tender to supply 20 trains in Bulgaria", *Railway Supply* (28 March 2024). https://www.railway.supply/en/crrc-has-withdrawn-its-bid-from-the-tender-to-supply-20-trains-in-bulgaria/

direct positive effects of a subsidy were *at least* €300 million. This raises several questions: were the potential negative effects of CRRC's offer greater than the €300 million in direct savings? Did the Commission articulate the potential negative effects prior to issuing the opening decision? If so, what potential theories of harm did the Commission consider?

Recommendations. While we agree that the impact of foreign subsidies needs to be assessed on a case-by-case basis, we propose to develop a simplified and systematised toolkit to guide such assessments. One possible way to simplify the assessment of a distortion to the internal market is to first distinguish between theories of harm applicable to acquisitions and procurement proceedings, and then further categorise them into:

a. Distortions to the process: include distortion of competition in the acquisition process (Section 2.4.4.1 of the Guidelines) and an undue advantage during the procurement (Section 2.5.1). This category refers to the potential direct impact of a subsidy on an outcome of acquisition or tender that entails constructing the counterfactual scenario and requires a different set of indicators than all other theories of harm. We recommend treating such process-related distortions as a default component of every in-depth investigation.

b. Distortions to the market: encompass all other relevant theories of harm that refer to the potential impact of a subsidy on the internal market once the acquisition or procurement process has been completed.[12] Importantly, market distortions are independent from process distortions – a foreign subsidy may affect market dynamics post-transaction without altering the transaction outcome, and vice versa.

Clarifying the distinction between process- and market-related distortions would significantly facilitate identification of specific indicators relevant to each theory of harm. Distortions to the process primarily involve reconstructing the likely outcome of a transaction or tender in the absence of a foreign subsidy. In such cases, key indicators would include the characteristics of the subsidy, the "fair" (or "unaffected") offer and the number of competitors potentially deterred from participating. Conversely, for distortions to the market, relevant indicators would include the characteristics of the investigated undertaking and market-specific factors such as concentration levels and

[12] It includes a broad range of possible effects, from distortions to the operating decisions to transfer of technologies (Sections 2.4.4.2–2.4.4.4).

barriers to entry. The Commission has already applied a similar approach in practice, during the investigation of the e&/PPF merger (FS.100011X).[13]

B. Constructing counterfactual scenarios may face empirical challenges

As a part of assessing distortions to the process, the Commission will construct counterfactual scenarios such as assessing how a tender might have unfolded had the investigated company not received a subsidy or identifying other bidders crowded out by the subsidised undertaking in the acquisition. Constructing these counterfactuals brings empirical challenges, for example:

a. Determining an offer unaffected by the subsidy. It remains unclear how the Commission intends to assess crowding out competitors and particularly what benchmarks and tools it will use to establish a "fair" bid, i.e. an offer the investigated undertaking would have submitted in the absence of a subsidy.

b. Identification of discouraged competitors. It is also unclear how the Commission plans to identify competitors deterred from participating in a tender or acquisition by the subsidised rival. Reconstructing such scenarios is often unrealistic, if not impossible, without access to internal documents of the target.

Recommendations. We recommend that the Commission further clarifies what measures and tools it plans to use in constructing such counterfactuals. It can rely on:

a. Adoption of anti-dumping tools. Measures and tools developed in the anti-dumping investigations could be effectively adapted to the FSR context to determine if the subsidy improved the competitive position of an undertaking and to establish the "unaffected" offer using the available benchmarks.[14]

---

13 EC, Commission decision of 24 September 2024 finding that, with the binding commitments, the foreign subsidies in the concentration do not distort the internal market (Case FS.100011 – e&/PPF Telecom Group) (September 2024). https://ec.europa.eu/competition/foreign_subsidies/cases/202514/FS_100011_979.pdf

14 One useful tool from EU anti-dumping regulation that could be adapted for FSR investigations is the dumping margin calculation. This involves comparing the export price – suspected to be artificially low – with the "normal value", typically based on benchmark prices from comparable transactions in the exporter's domestic market. In anti-dumping cases, this margin helps quantify the extent of price distortion. Where domestic prices in the exporting country are unreliable or unavailable, the normal value is instead based on production and sales costs in a representative third country. A similar approach could be adopted under the FSR to estimate the "fair" value of a bid, i.e. the offer unaffected by foreign subsidies. For further examples of dumping margin calculation, see e.g. anti-dumping investigation against lightweight thermal paper imports from South Korea (Hansol Group), anti-dumping investigation against certain seamless pipes and tubes of stainless steel imports from China (Zhejiang Jiuli Hi-Tech Metals Co. Ltd). https://eur-lex.europa.eu/eli/reg_impl/2023/593/oj/eng/pdf

b. Use of internal documents. Identifying competitors which may have been deterred from participating in an acquisition or procurement process may require access to internal documents of stakeholders and other market participants.

C. Harm to corporate control may also be a theory of harm

Concerning possible theories of harm, we would like to propose an additional one discussed in the economic literature: distortions in the market for corporate control.[15] Acquisitions facilitated by a foreign subsidy may distort competition in the market for corporate control. Changes in corporate control may in turn i) deteriorate the quality of management, ii) lead to loss of organisation-specific human capital due to displacement of existing leadership or iii) ultimately even lead to the target's exit if the synergies do not materialise. Conversely, subsidised acquisitions may generate certain efficiencies, e.g. by enabling installation of a more capable management team.

Therefore, the challenge is to distinguish between distortionary and non-distortionary acquisitions. Market structure indicators such as barriers to entry and concentration levels may help assess the likelihood and magnitude of such distortions. More specifically, lower barriers to entry and lower concentration levels may lead to smaller distortions, if at all.[16]

Recommendation. We strongly recommend that the FSR assessment framework explicitly consider potential negative effects of foreign subsidies on the market for corporate control, alongside other theories of harm.

II. Balancing test is still a "black box"

The FSR Guidelines provide further details on the application of the balancing test. As with the assessment of distortion, the Commission argues that the balancing test is conducted on a case-by-case basis and *"[...] takes into account the specific circumstances of the case [...]"*.[17] In general terms, the purpose of this assessment is to determine whether the negative effects of the foreign subsidy outweigh the positive ones. The positive effects may *"[...] enable the development of the economic activity in the*

15 Claici, A., P. Davis and G. Dijkstra, "Theories of Harm in the Implementation of the Foreign Subsidies Regulation", *European Competition & Regulatory Law Review* 8:1 (2024).

16 With low barriers to entry, the inefficient management board may come under competitive pressure from new entrants to improve. At the same time, when the concentration levels are low in the market, a non-subsidised EU is likely to have good alternative acquisitions even if it lost a bit to the subsidised company.

17 See FSR Guidelines, p. 22.

internal market [...]" and in certain cases can serve as a remedy to market failure.[18] Similarly to State aid framework, positive effects must be subsidy-specific, i.e. they would not materialise in the absence of a subsidy.[19] In the balancing exercise, the Commission will first try to determine whether the same positive effects could be achieved with a smaller distortion to the market than the one implied by a foreign subsidy.

A. Burden of demonstrating positive effects should be shared

The Guidelines clarify that the balancing test is not a numerical exercise; neither positive nor negative effects have to be "precisely" quantified. At the same time, the Commission urges that the evidence needs to be convincing. Importantly, the burden of proof is on the "persons claiming the existence of positive effects", typically the undertakings subject to FSR scrutiny. This requirement presents a practical challenge: companies do not have to and often do not internalise all positive effects that an investment may bring, or do not have this sort of information. Given its access to market data and overarching interest in transactions that benefit the EU (in particular transactions that may improve resilience of the supply chain), the Commission should provide clearer guidance to stakeholders on types of positive effects that may be considered relevant and the evidence required to support them.

Recommendations. We encourage the Commission to assist stakeholders in identifying and, where appropriate, quantifying the positive effects of the acquisition or procurement process. The Guidelines should also provide concrete examples of both relevant and irrelevant positive effects, along with key indicators for assessing them. Without further clarifications, the balancing test risks remaining a "black box", creating uncertainty for undertakings subject to FSR scrutiny.

B. Subsidy-specific positive effects are difficult, if not impossible, to distinguish

The definition of subsidy-specific positive effects remains unclear. The extent to which the positive effects are subsidy specific depends on the counterfactual scenario in the

18 The document allows the positive effects on other policy objectives recognised in the EU Treaties, e.g. environmental protection, research and development, economic resilience, etc. See FSR Guidelines, p. 24.

19 *"In practice, for the positive effects to be specific to the foreign subsidies, the person invoking those positive effects should be able to establish with a certain degree of likelihood that the foreign subsidies lead or are likely to lead to a change in behaviour of the undertaking benefitting from the foreign subsidy resulting in those positive effects"*. See FSR Guidelines, p. 26.

absence of the foreign subsidy, among other things. For example, in the context of an acquisition, one can think of three scenarios in the absence of the subsidy:

1. No acquisition without the subsidy: when the investigated undertaking was the sole bidder and without the subsidy would not submit a competitive offer. In such cases all positive effects of a merger are subsidy specific.

2. Acquisition occurs with the same bidder and unchanged scope: the foreign subsidy does not affect the acquisition process. In such instances there are no subsidy-specific positive effects, as the subsidy would not alter the outcome of the transaction. It is, however, possible that the subsidy creates positive effects post-transaction.[20]

3. Acquisition occurs with a different bidder: only the positive effects related to the value added of the investigated undertaking in comparison to its rivals would qualify as subsidy-specific positive effects.

Note that the above examples consider only distortions to the process; the subsidy-specific effects in the market are even more difficult to identify. Therefore, it is important to note that disentangling subsidy-specific positive effects from project-specific ones is complex and, in many cases, may prove challenging or even impossible.

Recommendations. We strongly advocate for further clarification of the balancing test and recommend the following:

a. Prioritise project-specific positive effects over subsidy-specific ones. As described above, identifying subsidy-specific positive effects is often challenging, if not impossible. The distinction between project- and subsidy-specific effects can be complex and difficult to disentangle. Instead, the Commission might simply consider project-specific positive effects and draw from the existing practice of documenting positive spillovers in the context of State aid.

   Consider an example of an acquisition in a high-tech industry where the acquirer benefits from a foreign subsidy for research and development. The subsidy itself does not affect the outcome of the transaction, so in principle there are no subsidy-specific positive effects. However, it would be incorrect to assume that this subsidy would not bring any positive effects, e.g. in case the acquirer decides to deploy in the EU the innovations developed thanks to the subsidy.

[20] For example, a research subsidy may not directly affect the outcome of the transaction, but knowledge dissemination or deployment of innovations generated by these subsidies may be a clear subsidy-specific positive effect post-transaction.

b. Consider various types of evidence to demonstrate positive effects. Positive effects can be identified using a combination of historical evidence from similar projects and economic theory. Economic literature highlights that certain types of investment can generate significant positive spillovers, in particular targeting regional industrial clusters and human capital.[21] It also provides the economic framework for assessing these effects, which may serve as a basis for the Commission's assessment.

C. Certain foreign subsidies can be presumed to bring positive effects

While the Commission has identified categories of foreign subsidies presumed to result in negative effects to the internal market, certain categories of subsidies likely bring positive externalities. For example, economic literature demonstrates that research and development subsidies, a standard instrument of industrial policy, typically have positive externalities, particularly in capital-intensive and innovation-driven sectors.[22] They enable firms to develop frontier technologies which may later be commercialised or deployed within the EU.

Recommendations. Consistent with the economic evidence and example of an acquisition in high-tech industry introduced above, the Guidelines might distinguish a set of foreign subsidies for which the positive effects are presumed. In such cases, the foreign subsidy would be recognised to bring likely positive effects to the internal market, unless the Commission proves otherwise.

III. Other considerations

A. Existence of a foreign subsidy needs further guidance

Notwithstanding the fact that the Regulation requires the Commission to issue guidelines only on a limited number or areas,[23] we believe that one area that would

21 See e.g. Delgado, Mercedes, Michael E. Porter and Scott Stern, "Clusters, Convergence and Economic Performance", *Research Policy* 43 (2014): 1785–1799; Glaeser, Edward L., and Albert Saiz, *The Rise of the Skilled City*, Brookings-Wharton Papers on Urban Affairs (2004): 47–94; Moretti, Enrico, "The Effect of High-Tech Clusters on the Productivity of Top Inventors", *American Economic Review* 111 (2021): 3328–3375.

22 See e.g. Aghion, Philippe, and Peter Howitt, "Appropriate Growth Policy: A Unifying Framework", *Journal of the European Economic Association* 4 (2006): 269–314; Bloom, Nicholas, Rafaella Sadun and John Van Reenen, "Americans Do IT Better: US Multinationals and the Productivity Miracle", *American Economic Review* 102 (2012): 167–201; Moretti, Enrico, and Daniel J. Wilson, "State Incentives for Innovation, Star Scientists and Jobs: Evidence from Biotech", *Journal of Urban Economics* 79 (2014): 20–38.

23 Existence of distortions, balancing, etc. See FSR Regulation, para 73.

benefit from further guidance and clarification is the existence of a foreign subsidy as defined by the FSR Regulation.[24]

While practitioners can draw parallels with the existence of State aid in assessing whether foreign financial contributions are to be considered as foreign subsidies under the FSR Regulation, the EC has issued a standalone Guidance paper to support the member states and beneficiaries to pre-assess whether public financial contributions represent State aid.[25] The notice on the notion on the existence of State aid is a comprehensive document that provides valuable guidance in particular as regards the benchmarking exercise, which ultimately determines whether a public contribution falls under the category of State aid.

Recommendations. While we understand the Commission's intention to retain flexibility – given the complexity of foreign subsidies – the current lack of precision around the definition of a subsidy creates considerable uncertainty for stakeholders. We therefore encourage the Commission to provide further guidance on the existence of a foreign subsidy in a similar way to the guidance available for the existence of State aid.

24 See FSR Regulation, Article 3.

25 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, European Commission (July 2016).